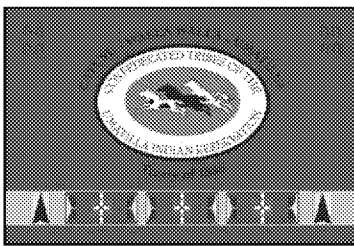


**Confederated Tribes *of the*
Umatilla Indian Reservation**

Department of Natural Resources
Administration



46411 Timine Way
Pendleton, OR 97801

www.ctuir.org
Phone 541-276-3165

ericquaempts@ctuir.org
Fax: 541-276-3095

January 15, 2020

Vicki L Walker, Director
Oregon Department of State Lands
775 Summer Street NE, Suite 100
Salem, OR 97301-1279

Re: Oregon Partial Assumption of Section 404 of the Clean Water Act Authority

Dear Director Walker:

On behalf of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR), we write in response to the State of Oregon Department of State Lands (DSL) proposal for "Partial 404 Assumption" under the Clean Water Act. The CTUIR has numerous concerns regarding the proposal, including ~~not~~ but not limited to potential impacts to tribal rights and resources reserved under the CTUIR's Treaty of 1855 (12 Stat. 945). We are also concerned about consistency and faithfulness to the federal Trust Responsibility owed to the CTUIR and other tribes. This Trust Responsibility is expressed within the Treaty, as well as in statutes, case law, executive orders and other authorities. Our concerns regarding this partial assumption also relate to many of the issues we raised when we met with DSL staff in 2012, and reiterated recently at the Natural Resources Workgroup and the Cultural Resources Cluster. This letter restates those issues and concerns and CTUIR DNR requests formal consultation on the proposed assumption of Section 404 of the CWA.

The CTUIR DNR appreciated DSL's attendance at the Natural Resource Workgroup on November 19, and the Cultural Resources Cluster meeting on December 4, to listen to tribal concerns and answer questions. We understand that DSL does not plan to submit any legislative language in the 2020 legislative session due to the short time-frame prior to that short session. The CTUIR is encouraged that DSL will have more time for consultation with tribes regarding this legislative proposal. However, we hope that the state can share draft legislation with the tribes for our review soon as we anticipate consultation and resolution of all the tribal issues will likely be a lengthy process. Since the process for state delegation commenced decades ago, we expect DSL has already prepared at least some legislative concepts. The CTUIR hopes for robust tribal consultation on this matter through all of 2020.

At our meeting on December 3, you correctly noted that tribes are not "stakeholders" in this process. Equally, tribes are not "interested parties" as the Cow Creek is listed in the final legislative report. The tribal status is weightier than either stakeholders or interested parties. Tribes are co-managers of these resources to which we have constitutionally and statutorily protected rights. The fact that this is only a "partial assumption" of Section 404 responsibilities in no way lessens the tribal interests and concerns, and DSL's obligations to the tribes. If Oregon seeks a full delegation, this process would potentially become a template, making tribal input all the more important.

As you may recall, the CTUIR met with DSL in 2012 during the last round of discussions of assumption under § 404. The primary concerns the CTUIR DNR expressed regarded the federal Trust Responsibility, Treaty Rights, cultural resource concerns, and many other issues. Below is a summary of the issues and concerns the CTUIR provided to DSL in 2012, which remain valid, along with additional concerns from recent discussions:

1. **Federal Trust Responsibility:** The Federal government has a legal obligation to tribes to protect the rights and resources the United States holds in trust for the tribes, including resources the U.S. manages. This trust duty obligation imposes a fiduciary duty owed in conducting any federal action which relates to Indian Tribes. In carrying out its fiduciary duty, it is the government's responsibility "to ensure that Indian treaty rights **are given full effect.**" *NW Seafarms v. U.S. Army Corps*, 931 F.Supp. 1515 (W.D. Wash. 1996). This responsibility is the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the U.S. and the federally recognized tribes as codified in treaties, statutes, executive orders, and case law, as well as other sources. This is a fundamental issue. The state has no such Trust Responsibility under state law, however if you assume the 404 permitting duties we would hold you to that federal Trust Responsibility and the associated obligations. Under the existing § 404 permitting system, the Corps of Engineers has an obligation to uphold the Trust Responsibility in their regulatory process. How does the state propose to meet this obligation when implementing this delegation? Attached you will find a permit decision made by the Army Corps of Engineers regarding a dock proposed at the mouth of Willow Creek that we believe does an adequate job discussing and addressing impacts to treaty rights. The CTUIR DNR would expect the same level of thoroughness if and when DSL issues permits.
2. **Treaty Rights:** The CTUIR's Treaty of 1855 reserved into perpetuity our preexisting rights to fish at all usual and accustomed fishing areas, as well as retaining rights to hunt, gather, graze on unclaimed lands, as well as exercise those other rights not explicitly ceded to the U.S. in the Treaty. The Treaty also implicitly reserved water rights, rights that preexist Oregon's statehood, and rights which must be protected in any regulatory processes impacting water. To ensure treaty rights are preserved into perpetuity requires knowledge of these rights and the legal ability to protect them. It is unclear whether DSL is able to do either. While ensuring that treaty rights are upheld is related to the Trust Responsibility of the federal government, it is also a separate issue, because of the fundamental nature of the treaties themselves. Treaties are acknowledged as the supreme law of the land under Article VI of the U.S. Constitution, and take precedence over conflicting state laws. The state may not be able or willing to protect and uphold the CTUIR's Treaty Rights.
3. **Endangered Species Act (ESA):** The CTUIR is concerned that provisions of the ESA that govern Corps of Engineers permits may not apply to permits issued by DSL. Protection of ESA species is not only a treaty-related issue, but many species also have tribal religious and cultural significance. Protection of the endangered species and their habitat is of utmost concern to the CTUIR. The United States Fish and Wildlife Service and National Oceanic and Atmospheric Administration, Fisheries Service have a process and history of tribal

involvement. Both the ESA protections and tribal consultation should be addressed in the legislative concept for the partial assumption.

4. **Sovereign Immunity:** States, like tribes, possess sovereign immunity from being sued, unless it is specifically waived. In the event the Corps of Engineers issues a permit that violates rights of the CTUIR, we can sue the Corps under the Administrative Procedures Act, a federal law that waives the sovereign immunity of the United States. However, it is unclear such an avenue is available to the tribe under Oregon State Law for DSL issuance of permits violating tribal rights. Additionally, the Corps of Engineers issues permits under their own regulatory authority as well as the National Environmental Policy Act (NEPA). The NEPA requires a thorough review of the impacts to a broad spectrum of resources. Oregon lacks a NEPA-like statute that considers direct, indirect and cumulative effects of permit actions. Such a legal standard should be built into the regulatory scheme.
5. **State Budget Vulnerabilities:** State agencies have budgets that are more vulnerable to changes in revenue and the political climate than the Corps of Engineers. How does the state propose to secure and keep sufficient funding to meet their obligations and not be subject to budgetary shortfalls? Further, the process of assumption of § 404 responsibilities is a significant undertaking unto itself. We do not believe that DSL has sufficient staff and resources to develop a process to even partially incorporate the § 404 functions in the two year time frame identified in its current planning effort. At a minimum, it would seem necessary to have at least one full-time employee working on this otherwise you have several employees attempting to add this additional task to their existing workload.
6. **Section 106 of the National Historic Preservation Act (NHPA):** Every element of the § 106 process is important, especially consultation with and the ability to involve the Advisory Council on Historic Preservation (ACHP). We are doubtful that DSL is able to create an equivalent process that includes all the elements of the NHPA and provides the necessary enforcement framework to support it. For example, for over a year, DSL and Oregon State Historic Preservation Office (SHPO) have disagreed over who is responsible to review DSL regulatory permits for cultural resource issues, resulting in neither DSL nor SHPO reviewing non-proprietary permits for cultural resource concerns. DSL has an archaeologist and the authority to review these permits for archaeology, but chooses not to do so. If DSL doesn't exercise the authority it has, why should the legislature give it more? And why and how would the public be assured that DSL would do so?

Further, DSL has communicated with the CTUIR that they do not believe they have any legal authority to deny or condition a permit based on impacts to cultural resources, citing May 3, 2019 email from Oregon Department of Justice, "ORS Chapter 196 gives DSL authority to deny a permit application when it will interfere with water resource values and navigation, fishing, and public recreation—but not to deny a permit (or condition a permit) as a result of interference with cultural resources." The tribes have been pushing DSL to resolve this issue for several years through individual consultation and the Cultural Resources Cluster to no avail. Any delegation of § 404 authority would necessarily require the state to possess the

authority to require addressing impacts to cultural resources. What has the state done to identify this necessary legal authority? The draft legislation that was on the DSL website only provided for adopting rules for implementing a process *equivalent* to § 106 of the NHPA, but if the state lacks the authority to deny or condition a permit due to impacts to cultural resources, the state would require more than rules, it would require legislation giving the state that authority to adopt those rules. Whether or not DSL achieves this delegation of § 404 authority, DSL needs the authority to condition permits on surveys and prevention of impacts to cultural resources.

7. **EPA/Corps Obligations Related to 404 Assumption:** The CTUIR anticipates that the EPA and the Corps will consult with the CTUIR regarding any proposed delegation of § 404 authorities. This is a non-delegable duty the federal government possesses under their Trust Responsibility and DSL should anticipate the time this would require in the DSL's process. EPA has indicated this delegation is a transfer of permitting authority from the Corps to Oregon rather than a direct delegation from EPA to the state. However, since the initial delegation is from EPA, we anticipate EPA's involvement.
8. **EPA's Lack of Capacity to Review Applications:** The CTUIR remains concerned that EPA lacks the ability to adequately review permits for NHPA compliance if the Corps of Engineers is not conducting the review. The EPA cannot waive review of permits that may affect historic properties. However, EPA Region 10 does not have the experience or staff to review applications that may adversely affect historic properties. There is no EPA Region 10 archaeologist, whereas the Portland District of the Army Corps of Engineers has archaeologists and cultural resource professionals on staff.
9. **EPA/Corps Consultation Policy:** The process described in EPA and the Corps' consultation policy is *not* equivalent to § 106 consultation. CTUIR will request formal consultation and ACHP involvement for review of this delegation.

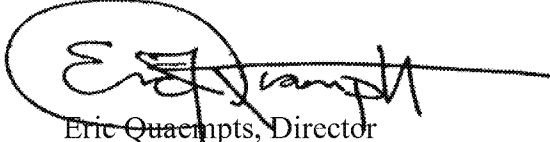
The CTUIR DNR understands that this partial assumption of § 404 responsibilities would relate to development activities within Urban Growth Boundaries, mining and activities associated with mining, and the creation and operation of mitigation banks. The CTUIR DNR would like to know the geographic extent of this delegation. As noted above, limitation of the delegation to activities within existing UGBs may appear to limit the potential impacts to tribal treaty rights and cultural resources; it does not. For example, Willamette Falls, an area of great significance for both exercising of treaty rights and the presence of cultural resources is within the UGB of Portland/Metro area. Further, mining occurs throughout the state, could this jurisdiction occur everywhere, including issuing § 404 permits for mining activities on federal lands adjacent to or within streams? While the UGB limitation is offers a significant limitation, the extension of the authority to mining and mitigation banks appears to contain no such territorial limitation.

Due to the depth and breadth of our concerns, the CTUIR requests formal government-to-government consultation with DSL, including meetings with DSL staff, written responses to our concerns, and potentially meetings among our leadership. Please have your staff contact Audie

CTUIR DNR Letter to DSL
Subject: Partial § 404 Assumption
January 15, 2020
Page 5 of 5

Huber, Intergovernmental Affairs Coordinator, at 541-429-7228 or AudieHuber@ctuir.org to arrange our first meeting on this.

Respectfully,



Eric Quampts, Director
Department of Natural Resources

Cc: Eric Metz, DSL Senior Policy and Legislative Analyst
Meliah Masiba, DSL Senior Policy and Legislative Analyst